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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AERONAUTICAL RADIO, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, ET AL., and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Aeronautical Radio, Inc. ("ARINC") prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 2, 1967, in a consolidated appeal including Case No. 20,128, *Aeronautical Radio, Inc.* v. *National Mediation Board, et al.* and Case No. 20,251, *International Brotherhood of Teamsters* v. *Aeronautical Radio, Inc.*, respectively affirming the District Court's dismissal of ARINC's complaint and reversing the District Court's

denial of summary judgment on respondent Teamsters' counterclaim.

OPINIONS BELOW

The opinion of the Court of Appeals, appearing in Appendix A to this petition, is not yet reported. The order of the District Court dismissing ARINC's complaint (Appendix B, *infra*) is not reported. The opinion of the District Court on the denial of summary judgment for the Teamsters is reported at 255 F. Supp. 466. That opinion and the order denying summary judgment are reproduced in Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1967 (Appendix D, *infra*). Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Railway Labor Act impose obligations upon an employer to bargain collectively where, as a result of a National Mediation Board representation election in which all employees expressed a choice, a union was certified although it received votes from less than a majority of the craft or class and from less than those who chose "no representation"?

2. Is the federal judiciary without jurisdiction to grant direct relief requested by an employer against the National Mediation Board which has certified the union on the basis of the evidence described above?

3. Must a court of equity enforce the Certification of the National Mediation Board issued on the evidentiary basis described above by issuing a mandatory injunction compelling the employer to bargain?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the Fifth Amendment to the United States Constitution; Section 2 (Fourth, Eighth and Ninth) of the Railway Labor Act, 45 U.S.C. § 152, Fourth, Eighth and Ninth; and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703. These provisions are reproduced in Appendix E, *infra*.

STATEMENT

ARINC is a communications company providing safety and operational air-ground communications to the nation's airlines and others through approximately 1250 ground radio stations in all 50 states, Puerto Rico and Okinawa.

In December 1964, the International Brotherhood of Teamsters ("Teamsters") invoked the services of the National Mediation Board under the Railway Labor Act and sought to be certified as the authorized representative of the 400-man craft or class of ARINC's radio and teletype operators, maintenance men and equipment technicians. The Air Line Dispatchers Association ("ALDA") also sought to represent these employees.

The Railway Labor Act provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ."* It also requires the National Mediation Board "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives . . . ."**

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* Section 2, Fourth, 45 U.S.C. § 152, Fourth.

** Section 2, Ninth, 45 U.S.C. § 152, Ninth.

Pursuant thereto, the Board conducted a secret ballot election among the 400 employees to ascertain who, if anyone, the majority desired as the craft's agent for collective representation.

All parties and the Court of Appeals agree that out of the 400 eligible voters the count was 179 (the largest group) for "no union", 147 for the Teamsters and 74 for ALDA.* Notwithstanding, the Board issued a Certification designating the Teamsters as the bargaining representative for the 400-man craft or class (R. 16).** No explanation was given as to how the choice of only 147 out of 400 employees could constitute the organization which the majority of the craft or class desired. Nor was any other evidence ever adduced before or cited by the Board as a basis for such a conclusion.

When its request to the Board for reconsideration was denied, ARINC filed a suit in the District Court attacking the validity, under the Constitution and the Railway Labor Act, of the Board's action in issuing the Certification on the basis of the evidence then of record (R. 3). Federal jurisdiction was based on 28 U.S.C. §§ 1331, 1332, 1337, 2201, and 2202; 5 U.S.C. § 703 and D.C. Code § 11-521 (1961 ed. Supp. IV.).

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* The Mediation Board election ballot provides no way for an employee to affirmatively indicate a desire not to be represented by a union, thus an employee who fails to vote or casts a void ballot is "treated as having voted for no representation" *Railway Clerks v. Employees Association*, 380 U.S. 650, 670-71 (1965). Accordingly, in the instant election all parties and the Court of Appeals agreed that 179 employees have voted for "no union". Opinion of Court of Appeals, June 2, 1967, *infra*, pp. 2a-3a.

** "R. —" refers to the Consolidated Joint Appendix in the Court of Appeals, of which a certified and nine additional copies are filed with this petition.

On the Board's motion, the court dismissed the complaint on the grounds that it lacked "jurisdiction over the subject matter".* An appeal to the United States Court of Appeals for the District of Columbia Circuit (Appeal No. 20,128) followed.

In the District Court the Teamsters, who had previously intervened as defendants, moved for summary judgment on a counterclaim seeking a mandatory injunction based on the Certification, compelling ARINC to recognize and bargain with them as the representative of the craft or class. In opposition, ARINC argued, *inter alia,* that the NMB's Certification was invalid. The Teamsters' motion was denied by another judge of the District Court, who held that "The Supreme Court in the Switchmen's case [320 U.S. 297] expressly left open the question what a Court of Equity may consider when its affirmative help is asked for a decree to enforce the certificate of the Mediation Board and require the employer to bargain collectively with the Union so certified . . . . ," and, with respect to this case, "that the strong arm of equity should not be exerted in order to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all."** The Teamsters' appeal from that decision (Appeal No. 20,251) was subsequently consolidated by the Court of Appeals with Appeal No. 20,128.

On June 2, 1967, the Court of Appeals affirmed the District Court's dismissal of ARINC's complaint and reversed the denial of the Teamsters' motion for sum-

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* *Infra,* p. 6a.

** *Infra,* pp. 9a, 10a.

mary judgment. The Court held, *inter alia,* that it was a "permissible conclusion" of the National Mediation Board "that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified." *

REASONS FOR GRANTING THE WRIT

This case presents questions fundamental to the administration of the Railway Labor Act which will continue to plague the National Mediation Board, and the federal courts, until answered by this Court. As detailed below, they entail the resolution of basic conflicts between the principles enunciated by this Court in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937) and in *Railway Clerks* v. *Employees Association,* 380 U.S. 650 (1965), and the action of the Mediation Board and the Court of Appeals in the instant case.

Also posed are significant questions as to the jurisdiction of the federal judiciary (1) when it is asked for relief by an employer who is aggrieved as a result of unauthorized or arbitrary action by the Mediation Board and (2) when, in defense against requested judicial enforcement of the Railway Labor Act's obligation to bargain, an employer challenges the legality of the Mediation Board's action upon which the claim for enforcement is based.

I.

Section 2, Ninth of the Railway Labor Act places a duty on the National Mediation Board to conduct an

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* *Infra,* p. 4a.

investigation by secret ballot or "any other appropriate method" to ascertain the desires of the majority of the craft or class as to who, if anyone, is to be the collective bargaining representative of the class.

The Act, through Sections 2, Fourth and Ninth, also imposes statutory obligations on an employer to bargain with the representative certified by the Mediation Board as being desired by a majority of the craft or class and prohibits bargaining with any other representative.

On the other hand, "If the majority of a craft or class has not selected a representative . . ." these obligations do not arise, and the "carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions." *Virginian Ry. Co.* v. *System Federation, No. 40,* 300 U.S. 515, 548 n. 6 (1937).

The Mediation Board has at times certified a union which has received the written ballots of *less* than the majority of the craft or class (where the majority has voted for *some* union). This practice was squared with the "majority of any craft or class" requirements of Section 2, Fourth by this Court by applying the presumption that those who did not actually cast ballots could be presumed to assent to be bound by the will of the majority of those who did. *Virginian Ry. Co.* v. *System Federation No. 40 supra,* at 560.

However, in 1965, in *Railway Clerks* v. *Employees Association,* 380 U.S. 650, this Court rejected a pre-election challenge to an NMB ballot which provided no place for an employee to vote for "no union", but only by positing that: (1) an employee refraining from casting a written ballot must be counted as "a vote for

no representation", and (2) that the above presumption of the *Virginian Ry.* case—that employees who refrain from casting ballots are presumed to consent to the choice of the majority of those casting written ballots—*did not apply.* 380 U.S. at 670.

In the instant election, all parties agree that the largest group, 179, voted for no representation, 147 voted for the Teamsters and 74 for ALDA. This being the sole evidence of record as to employee preferences, there is as yet no basis for the Board's determination that the Teamsters, or any other choice, is desired by the majority of the craft or class. On the other hand, the Board's investigation *does* show that 253 (63%) of the employees have thus far chosen something *other* than the Teamsters.

The result of the Court of Appeals decision in sustaining the Board is that even where the sole evidence of record of employee preference consists of the above described vote count, it is nonetheless permissible for the Board to conclude—at that point—(1) that there is an organization desired by the majority of the craft and (2) that this organization is the Teamsters.

In order to achieve this result, the Court held that the Board reached a "permissible conclusion" under the Railway Labor Act in deciding "that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified". (*infra,* p. 4a). The Court cited no authority for its conclusion that *where every member of the craft has expressed his choice* the Act *still* permits the certification of a union which is only the choice of a majority of those voting for some union, rather than the majority

of the craft or class. This lack of cited authority is understandable since all significant precedent is to the contrary.

For example: (1) the Act unqualifiedly states that the "*majority of any craft or class* of employees shall have the right to determine *who* shall be the representative";* (2) the legislative history of the Act shows that the precise meaning of "majority" in Section 2, Fourth was discussed and was understood by Congress to mean the majority of the entire craft or class, not just of those who favored "some" union;** (3) this Court, in *Virginian Ry. Co.* v. *System Federation No. 40* treated the word "majority" in Section 2, Fourth as referring to a "majority *of those eligible to vote*",*** i.e., the majority of the *entire* craft or class; and (4) the United States Court of Appeals for the District of Columbia Circuit, in 1943, said that the purpose of the Railway Labor Act was to "furnish a procedure whereby the employees of a particular craft or class could attain a representation by *the organization* which the *majority* of the craft or class desired", *Switchmen's Union* v. *NMB,* 135 F. 2d 785, 796 (1943), *rev'd on other grounds,* 320 U.S. 297 (1943) (latter emphasis by the court).

Thus, the action of the Board, as sustained by the Court of Appeals, distorts the plain language and in-

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* Section 2, Fourth (emphasis added).

** Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 35, 57. [Testimony of Commissioner Eastman, the draftsman of the Act].

*** 300 U.S. 515, 560 (1937) (emphasis added). As indicated at p. 7, *supra,* the Court fashioned a statutory majority by employing a "presumption"—a presumption which is concededly not available here.

tent of the Railway Labor Act, and expands the obligations which Congress placed upon employers. It does so by extending these duties so as to require the employer to bargain collectively when the majority of a craft or class has *not* yet selected a representative, and by specifically compelling bargaining with an organization which is the choice of less than a majority of the craft, and which, as the only evidence of record shows, has been opted against by 253 (63%) of the craft.

While, as shown above, the holding of the Court of Appeals rests on an erroneous view of the "majority" language of the statute, it should also be observed that the Court nevertheless does appear to offer an explanation as to how the Teamsters' 37% actual vote might be augmented into the required majority of the entire craft or class. The court states:

> "Even after taking account of the fact that failure to vote at all is to be treated as a vote for no representation and that the same is true of failure to cast a valid ballot, *it is clear that the Board was entitled to view the circumstances in light of the 'practicalities of voting the fact that many who favor some representation will not vote. . . .' Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669 n. 5." *Infra,* p. 4a (emphasis added)

By thus taking a portion of a sentence out of an *obiter dictum* footnote in the *Railway Clerks* opinion of this Court, the Court of Appeals, despite protestations to the contrary, is clearly saying that a refusal to vote for representation is *not quite* a vote for no representation. Yet, by permitting use of a ballot without a no union box and at the same time permitting the Board to conjure up a "view" nullifying the rule that no vote is a vote for no representation, the Court

of Appeals' theory violates the conditions under which this Court permitted the NMB's unique ballot to be used (380 U.S. at 670). In short, if *this* is the Court of Appeals' basis for validating the Board's conclusion of the desires of the majority, then that court has revived the presumption, rejected by this Court in *Railway Clerks,* that a refusal to vote in an NMB election may be used to support unionization, notwithstanding the fact that the employee has no other way to vote against it.*

II.

The Railway Labor Act imposes an obligation on the Mediation Board to conduct an investigation to determine who, if anyone, is desired by the majority of the craft or class as bargaining representative. The qualitative standards for the Board's duty to investigate stem from both the Act and the Constitution. The Act (Section 2, Ninth) imposes on the Board a "duty to make such an investigation as the nature of the case requires." *Railway Clerks* v. *Employees Association,* 380 U.S. 650, 662 (1965). Constitutional considera-

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* The Board's predisposition to continue to accord less weight to a vote for "no union" than "for" a union is reflected in its refusal in this case to employ its established procedures for run-off elections. 29 C. F. R. § 1206.1. Under these regulations, if the 179 votes here cast for "no union" had been cast for a *third* union instead, its own rules show that the Board would *not* have considered the election an adequate basis for certifying *even the union which received the highest number (179) of votes.*

Yet in the instant case, simply because the highest number of votes were cast for "no union", they are ignored, and the Board concluded, without further investigation, that even the choice receiving the second highest number of votes (147) is the choice of the majority. In this manner, the Board still accords more weight to a vote "for" a union than to a vote for "no union".

tions require that the resulting determination of who shall be the representative "must be the result of a process of reasoning." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 136 (1951).*

Having failed to develop the facts from which it can rationally determine what the statute requires it to determine, the Board has not conducted an "investigation such as the nature of the case requires" and has thus failed to perform its duty under the Act. Having made the determination in the absence of the requisite facts, it has impinged on the Constitutional standard.

As a result of the Board's action, the petitioner will be burdened with obligations not authorized by law. Under such circumstances, relief has traditionally been available in the federal courts, *e.g., Harmon* v. *Brucker,* 355 U.S. 579, 581-82 (1958), and it has been consistently indicated that it would be available even if the offending agency were the National Mediation Board. *See, e.g., Railway Clerks* v. *Employees Association,* 380 U.S. 650, 669, 671 (1965) (Indicating jurisdiction to review action in excess of statutory authority, 380 U.S. at 669, 671; or for failure to perform statutory duty to investigate under Section 2, Ninth, *Id.,* at 661, 665.).

The refusal of the lower courts to assert jurisdiction in the circumstances of this case is not only in error but seriously impairs the essential doctrine of afford-

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* This Court there described the limits of a governmental determination as follows:

"An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men." 341 U.S. at 136.

ing judicial relief to parties aggrieved by unauthorized government action.

IV.

The District Court having exercised its discretion and refused to issue a mandatory injunction against petitioner, will now be forced, under the judgment of the Court of Appeals, to issue its most extraordinary equitable remedy to compel petitioner to bargain (1) when the majority of the craft or class has yet to designate a representative and (2) with a representative thus far rejected by 63% of the craft.

The former is not authorized by the Act (*Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 548 n. 6), and the latter contravenes what this Court has noted as one of the Act's primary objectives, i.e., the "preventing [of] such bargaining with any who do not represent" the majority. *Id.* at 548.

Determination of what a court of equity may or may not consider when asked to enforce an NMB certification under these circumstances is a matter of signal importance to the administration of the Act—as well as to the role of the federal judiciary when asked to implement and enforce administrative determinations.

That question was expressly left open by this Court in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 307 (1943), when it stated:

> "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us."

That question is now presented by this case and should be answered.

CONCLUSION

In the 1965 *Railway Clerks* case, the National Mediation Board urged that the time was not then ripe for this Court to consider the "majority choice" issues under the Act now presented by *this* case. The Board said:

> "4. Since no election has been held in this case, the Board has drawn no conclusions from the balloting. The Courts may not interfere with a representation election on the ground the circumstances *may* develop later in which the Board *may* draw conclusions from the balloting which *may* lead to the certification of a representative which *may* not be the majority choice." (emphasis in original)*

We respectfully submit that the questions which the Mediation Board urged the Court in that case not to consider, and which indeed were not answered, are now properly before this Court for its consideration.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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* Reply Brief of National Mediation Board and its members, p. 6, Nos. 138, 139, and 369, O.T. 1964, *Railway Clerks* v. *Employees Association*, 380 U.S. 650 (1965).

APPENDIX

Before DANAHER, BURGER and WRIGHT, *Circuit Judges*.

PER CURIAM: Under circumstances to be described, the National Mediation Board certified the Teamsters[1] as collective bargaining representatives of a craft employed by Aeronautical Radio, Inc. (ARINC). The company, which is subject to the Railway Labor Act, provides air-ground communications to the nation's airlines throughout the United States, Puerto Rico and Okinawa.

In No. 20128, ARINC seeks reversal of a District Court order which for lack of subject matter jurisdiction had dismissed ARINC's complaint after ARINC had sought to have the Board's certification set aside.

In No. 20251, Teamsters contend that as intervenors in ARINC's action, they were entitled to summary judgment on their counterclaim seeking a mandatory injunction to compel ARINC to bargain with them.

In December 1964, the Teamsters filed an application under section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 152 (1964), for certification as the bargaining representative of a 400 member craft. Shortly thereafter the Air Line Dispatcher Association, AFL-CIO (ALDA), upon its request, was made a party to the dispute.

The National Mediation Board held hearings and directed an election to be held. The election was conducted by mail. The ballots provided spaces for a vote for the Teamsters, for a vote for ALDA, and one in which an employee could write in the name of "Any Other Organization or Individual." The ballot also provided "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

The count of the ballots revealed that 147 employees had voted for the Teamsters, 74 had voted for ALDA,

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

but 179 did not vote or submitted void ballots.[2] The Board thereupon certified the Teamsters as the authorized representative of the craft, whereupon ARINC in the District Court sought to have the Board's certification set aside.

Before ARINC's action was dismissed for lack of subject matter jurisdiction, the Teamsters were granted leave to intervene as party defendant. They filed an answer and a counterclaim[3] seeking a mandatory injunction to compel ARINC to bargain with them. The District Court denied the Teamsters' motion for summary judgment on its counterclaim.

I

Turning first to the dismissal of ARINC's complaint, it is clear that the jurisdiction of the courts to review employee representation proceedings is extremely limited. *Switchmen's Union* v. *Board,* 320 U.S. 297, 305 (1943); *Railway Clerks* v. *Employees Assn.,* 380 U.S. 650 (1965); *Bro. of Ry. & S.S. Clerks, etc.* v. *National Mediation Board,* —— U.S.App.D.C. ——, ——, 374 F.2d 269, 272 (1966). We are not here presented with a situation in which the Board acted "in excess of its delegated power and contrary to specific prohibition in the Act." *Leedom* v. *Kyne,* 358 U.S. 184, 188 (1958).

ARINC argues that the Board has failed to perform its duty to "investigate" as required by section 2, Ninth, of the Railway Labor Act. Cf. *Railway Clerks* v. *Employees Assn.,* 380 U.S. at 661-668. As the Court commented, "This command is broad and sweeping. We should note at the outset that the Board's duty to inves-

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[2] All parties agree that these last 179 should be considered as votes for no union. Of this number, 25 ballots were found to be void.

[3] Thereafter ARINC filed an answer and a counterclaim seeking an injunction against a threatened strike. ARINC's counterclaim is still pending.

tigate is a duty to make such investigation as the nature of the case requires." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 662. Here the Board investigated to the extent of holding an election, ascertaining the results, and designating a bargaining representative. ARINC claims, however, that this "investigation" was deficient in that the results of the election would not permit a rational and non-arbitrary conclusion that the Teamsters were the choice of the majority.

The Board's certification reflects a conclusion that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified. The ballot had expressly provided that if "less than a majority of the employees cast valid ballots, no representative will be certified." Even after taking account of the fact that failure to vote at all is to be treated as a vote for no representation and that the same is true of failure to cast a valid ballot, it is clear that the Board was entitled to view the circumstances in light of the "practicalities of voting the fact that many who favor some representation will not vote . . . ." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669 n.5. To reiterate, more than a majority of the craft voted for union representation. Of those a majority, as noted, had selected the Teamsters, and we think the Board reached a permissible conclusion. In the context of all factors discussed, we will not say that the "investigation" was insufficient, cf. *Virginian Ry.* v. *Federation*, 300 U.S. 515, 559-562 (1937), for it is clear that the "details of selecting representatives were to be left for the final determination of the Board." *Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669. We conclude that there is no showing that the Board has failed to perform its duty to investigate or that it has acted in excess of its statutory authority. Thus the District Court properly held that it was without jurisdiction, and dismissal of ARINC's complaint was proper.

II

In denying summary judgment on the Teamsters' claim for mandatory injunction, the District Court concluded that "the strong arm of equity should not be exerted to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all. The Court may not set aside the certificate, but when its assistance is sought to be invoked by way of a decree in equity, the Court has a right to decline its assistance on the basis of equitable considerations."

In *Switchmen's Union* v. *Board,* 320 U.S. 297, 307, the Court did not decide "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board . . . ." Here we need not detail the powers of an equity court when faced with a suit for a mandatory injunction to compel compliance with section 2, Ninth of the Act. The District Court's refusal to grant the relief requested was based upon what it called "equitable considerations." It is clear, in our opinion, that the only arguable equitable consideration was that the Board's certification of the Teamsters did not represent the choice of the actual majority of all employees in the craft. But there could on this account have been an infirmity only if the Board had not fulfilled its statutory duty to "investigate" and determine the majority choice. "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act," section 2, Fourth. Since the contention to the contrary on this phase of the case has been rejected in our examination of whether the District Court had jurisdiction of ARINC's suit, and no other equitable ground has been made to appear on which relief should be denied, the decision of the District Court should be reversed. Cf. *Virginian Ry.* v. *Federation,* 300 U.S. 515, 559-562.

No. 20128—Affirmed.
No. 20251—Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3010-65

AERONAUTICAL RADIO, INC., *Plaintiff*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Defendants*.

Order

This cause came on for hearing on defendants' motion to dismiss or in the alternative for summary judgment. This motion is predicated, *inter alia*, on the contention that this Court lacks jurisdiction over the subject matter of plaintiff's suit. In view of the particular facts of this case and the pertinent authorities,[1] the Court is of the opinion that defendants' contention, namely, this Court lacks jurisdiction, is correct; therefore, it is this 6th day of April, 1966,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted.

OLIVER GASCH
Judge

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[1] *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Railway Clerks* v. *Employees' Association*, 380 U.S. 650 (1964)

Order

This cause came on to be heard on Intervenor-Defendant's Motion for Summary Judgment on its Counterclaim. After hearing argument of counsel in open court on May 27, 1966, and considering the foregoing Motion, Memoranda and Exhibits submitted by the parties, it is by the Court this 7th day of June, 1966

ORDERED, ADJUDGED AND DECREED that Intervenor-Defendant's Motion for Summary Judgment be, and it is hereby denied.

ALEXANDER HOLTZOFF, *Judge*

Seen:

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Washington, D. C. 20006
Attorney for Plaintiff

APPENDIX C

AERONAUTICAL RADIO, INC., *Plaintiff*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Defendants*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Intervenor-Defendant*.

Civ. A. No. 3010-65.

United States District Court
District of Columbia.

May 27, 1966.

* * * * * * * * * * *

Raymond G. Larroca, Washington, D. C., for plaintiff.

David S. Barr, Washington, D. C., for intervenor-defendant.

HOLTZOFF, District Judge.

In an election conducted under the auspices of the National Mediation Board, the International Brotherhood of Teamsters was deemed by the Board as having been elected to represent certain classes of employees of Aeronautical Radio, Inc., and this Union was certified accordingly. The employer brought this action against the National Mediation Board to set aside the certificate. Another Judge of this Court dismissed the complaint for lack of jurisdiction over the subject matter. In the meantime, however, the International Brotherhood of Teamsters intervened as an additional defendant and has filed a counterclaim against the employer to require the employer to bargain with the Union collectively, that is, to negotiate in acccordance with the provisions of the Railway Labor Act, which is made applicable to the industry involved in

this action. The matter is now before this Court on the intervening defendant's motion for summary judgment on its counterclaim.

[1, 2] It is well established that there is no judicial review of a certification of the National Mediation Board certifying what organization, if any, is to represent certain groups of employees. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. This conclusion, however, is not unlimited. The Supreme Court in the Switchmen's case expressly left open the question what a Court of equity may consider when its affirmative help is asked to enforce the certificate of the Mediation Board and require the employer to bargain collectively with the Union so certified. In an action for equitable relief traditionally the Court may always consider matters that appeal to the conscience of a Court of equity and may weigh equitable elements.

[3] This Court will not go behind the certification of the National Mediation Board, but on its face the certificate discloses the following facts. The number of employees eligible to vote at the election was 400. Of these 179 did not vote. 147 voted in favor of the International Brotherhood of Teamsters. 74 voted in favor of Air Line Dispatchers Association, AFL-CIO.

The type of ballot used by the National Mediation Board makes no provision for a person who desires to vote that there be no union. This course is contrary to the practice of the National Labor Relations Board, which uses a type of ballot that contains a space for a voter to vote against having any union whatever. The validity of the type of ballot used by the National Mediation Board was sustained by the Supreme Court in Brotherhood of Railway and S. S. Clerks etc. v. Association for Ben. of Non-Contract Employees, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133. The Supreme Court, however, in holding that the type of ballot used by the National Mediation Board is legal

attached the qualification that under ballots of that type, eligible voters who do not vote must be deemed to have voted against having any union whatever.

[4]. Therefore, we have a situation where 179 voters must be deemed to have voted against any union whatever, 147 to have voted in favor of the International Brotherhood of Teamsters, and 74 to have voted in favor of Air Line Dispatchers Association, AFL-CIO. There is no majority, but the plurality, by far the greatest plurality, must be counted as voting for no union whatever.

Under the circumstances, the Court reaches the conclusion that the strong arm of equity should not be exerted in order to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all. The Court may not set aside the certificate, but when its assistance is sought by way of a decree in equity, the Court has a right to decline its aid on the basis of equitable considerations.

In the light of this discussion the motion for summary judgment on the counterclaim is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

[Filed June 2, 1967]

No. 20,128

Civil 3010-65

AERONAUTICAL RADIO, INC., *Appellant*

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*

No. 20,251

Civil 3010-65

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellant*

v.

AERONAUTICAL RADIO, INC., *Appellee*

Appeals from the United States District Court for the District of Columbia.

Before: Danaher, Burger and Wright, District Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that in case No. 20,128 the order of the District Court appealed from is affirmed; and

(2) that in case No. 20,251 the judgment and order appealed from is reversed, and this case is remanded to the District Court for proceedings not inconsistent with the opinion of this court.

Per Curiam

Dated: June 2, 1967

APPENDIX E

Constitutional and Statutory Provisions Involved

United States Constitution, Amend. V:

> ". . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act, Section 2, Fourth, 48 Stat. 1187, 45 U.S.C. § 152, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during

working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Railway Labor Act, Section 2, Eighth, 48 Stat. 1187, 45 U.S.C. § 152, Eighth:

> Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Railway Labor Act, Section 2, Ninth, 48 Stat. 1188, 45 U.S.C. § 152, Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class

for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U.S.C. § 703:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of proceedings.

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable

form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Acts reviewable.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Relief pending review.

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency

action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 434

AERONAUTICAL RADIO, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, et al., and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN OPPOSITION

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ARGUMENT

The petitioner, Aeronautical Radio, Inc., (hereinafter referred to as ARINC) contends that the court below erred in upholding the decision of the District Court that it had no jurisdiction, on the showing made before it, to review a certification by the National Mediation Board of respondent International Brotherhood of Teamsters (hereinafter referred to as Teamsters) as the authorized representative of a craft or class of certain technicians and maintenance men employed by petitioner. ARINC asserts that the Board failed to fulfill its statutory duty to investigate a representation dispute when, after holding an election among the contending unions, it certified the Teamsters although the Teamsters had received a vote of less than a

majority of all in the craft or class, but more than a majority of those desiring to select a representative for bargaining purposes.

1. To begin with, it is recognized by all parties that jurisdiction of the courts to review representation investigations and certifications of the National Mediation Board is extremely limited. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Railway Clerks* v. *Employees Association*, 380 U.S. 650 (1965). Here, admittedly, and as found by the courts below, the Board had investigated the application for certification filed by the Teamsters "to the extent of holding an election, ascertaining the results, and designating a bargaining representative." *Aeronautical Radio, Inc.* v. *NMB*, U.S. Court of Appeals for the District of Columbia Circuit, Consolidated Appeal Cases No. 20, 128 and No. 20, 251, June 2, 1967, . . . F2d . . ., 2 Lab. Rel. Rep. (65 LRRM 2522) Appendix to Petition, p. 4a. ". . . . . [T]he Board's duty to investigate is a duty to make such investigation as the nature of the case requires." *Railway Clerks* v. *Employees Association*, 380 U.S. at 662. In that case the court, after finding that the Board had performed its statutory duty to investigate the representation dispute, stated (380 U.S. at 668):

> "Its determination, therefore, is not subject to judicial review. *Switchmen's Union* v. *National Mediation Board, supra.* As was pointed out there, the 'highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act', id., at 305, indicates the confidence that it reposed in the Board. In turn the fair and equitable manner in which the Board has discharged its difficult function is attested by the admirable results it has obtained."

It was made abundantly clear that the "details of selecting representatives" is "to be left for the final determination of the Board." 380 U.S. at 668-669.

2. Even if the courts below had jurisdiction to review the certification, it must be concluded that said certification was valid and had been properly issued. On the merits, the

issue regarding the validity of the certification stems from a difference of interpretation of the following language of Section 2, Fourth of the Railway Labor Act (45 U.S.C., Sec. 152, Fourth): "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft." There are at least two reasonable interpretations that may be applied:

(1) The Statute dictates that no single union can be certified *unless it receives the vote of an absolute majority of all eligible employees in the class or craft.* This is ARINC's interpretation. On the facts of this case, there were 400 eligible employees of whom 147 voted for the IBT, 74 voted for ALDA (another labor organization), 25 cast void ballots, and the remainder did not vote. ARINC would contend that since the IBT did not receive 201 votes, it could not be certified.

(2) The Statute dictates solely that the majority of the employees in the craft or class shall make the determination as to who shall represent the craft or class. Stated otherwise, the Statute merely defines *the decision-making body.* It remains silent as to how the determination shall be made. This is the interpretation that has been adopted and applied by the NMB from the enactment of the Railway Labor Act to the present time. Applying it to the instant case, the NMB determined that 221 employees (a clear majority of the craft or class) had cast valid ballots and that, therefore, the election was valid.[1] That determination exhausted the statutory requirement. The Board further determined that a majority (147) of the decision-making body (221) had chosen the IBT. Accordingly, the IBT was certified.[2]

The foregoing application of the statute by the NMB has received the consistent approval of the Supreme Court.

---

[1] Had a majority of the eligible employees failed to cast valid ballots, no union would have been certified.

[2] This procedure is explained on the ballot and was carefully and repeatedly explained to the employees by ARINC prior to the vote. See (J. A. 15, 43-52).

In Virginia Ry. v. System Federation, 300 U. S. 515, 559-560 (1937), the Board's certification of the Federation as the representative of a certain craft or class was attacked "because less than a majority of that craft, although a majority of those voting, voted for the Federation." 300 U. S. at 560. The Supreme Court rejected the attack and approved the procedure:

> "Section 2, Fourth of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act'. Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. *It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised.* Election laws providing for approval of a proposal by a specified majority have been generally construed as requiring only the consent of the specified majority of those participating in the election" [citations]. 300 U. S. at 560 (emphasis added).

The NMB's interpretation, practice and procedure were reaffirmed in Railway Clerks v. Employees' Ass'n., 380 U.S. 650 (1965). In that case, United Airlines made substantially the same arguments that ARINC reargues here (Brief for Petitioner, United Air Lines, Inc., No. 139, October Term, 1964, pp. 51-54). The Supreme Court stated (380 U.S. at 668-670):

> Using the Board's ballot, an employee may refrain from joining a union and refuse to bargain collectively. All he need do is not vote and this is considered a vote against representation *under the Board's practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid.*
>
> * * * * * * * *
>
> *Thus, under the Board's practice, a majority of the craft or class, as required by Sec. 2, Fourth, does have the right to determine who shall be the representative*

of the group, or, indeed, whether they shall have any representation at all. (Emphasis supplied.)

Therefore, to argue here, as does ARINC, that the 179 [3] who did not vote must be pitted against the 147 who voted for the IBT plainly contradicts the holding in Railway Clerks. For under the Board's practice, as approved by the Supreme Court, the 179 who failed to vote were not part of the decision-making "majority of [the] craft or class" who would determine "who shall be the representative of the craft" (Section 2, Fourth). And, if the Board's decision "is not acceptable, the place to go is to Congress," not to the courts. Railway Clerks, *supra,* 380 U. S. at 671.

The court below followed this reasoning when it found that because a majority of the craft had voted for union representation and the majority of those so voting had selected the Teamsters, the Teamsters certification was a proper one under the Railway Labor Act.

This Court, in *Switchmen's Union, supra,* (320 U. S. at 305,) after examining the legislative history of the Railway Labor Act, stated: ". . . [T]he intent seems plain — the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

To prevent unprecedented avenues for review of Board certifications from being opened, contrary to the rule that Board certifications are not subject to judicial review, the petition herein should be dismissed.

Respectfully submitted,

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[3] The 25 who cast void ballots are deemed to have cast no vote at all.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Columbia dismissing petitioner's complaint (Pet. App. 6a)[1] is unreported. The opinion of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "R." refers to the Consolidated Joint Appendix in the court of appeals, nine copies of which petitioner has filed in this Court.